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No. 81-331

IN THE

Supreme Court of the United States

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA
and
THE UNITED CONTRACTORS ASSOCIATION,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF ON BEHALF OF PETITIONERS THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA AND THE UNITED CONTRACTORS ASSOCIATION

JOHN J. MCALEESE, JR.*
THOMAS J. MCGOLDRICK
LOUIS A. MINELLA
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004
(215) 667-7080
Attorneys for Petitioners

CUNNIFF, BRAY & MCALEESE
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, Pennsylvania 19004
Of Counsel

*Counsel of Record for Petitioners

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-5711

QUESTIONS PRESENTED

1. Whether 42 U. S. C. § 1981 requires for its violation proof of an intent to discriminate by the party against whom liability is sought to be imposed?

2. Whether, under 42 U. S. C. § 1981, a collective bargaining representative for employers may be liable for discrimination by a union of operating engineers where that representative neither knew nor had reason to know of the union's discriminatory conduct?

3. Whether, under 42 U. S. C. § 1981, there can be vicarious liability by virtue of *respondeat superior* where there was no service performed for the entity held liable and where that entity does not have either control or the right to control?

4. Whether 42 U. S. C. § 1981 creates a non-delegable duty to insure that another who performs no service refrains from discrimination?

5. Whether under the circumstances of this case a non-wrongdoing association which does not employ operating engineers can be subjected to a far-reaching injunction which imposes, *inter alia*, substantial financial obligations on the association but which was issued only because of discriminatory conduct by a union?

PARTIES IN THE COURT OF APPEALS *

The parties in the court of appeals were:

Plaintiff-Appellees:

(a) the Commonwealth of Pennsylvania; and,

(b) twelve individuals (Messrs. Raymond Williams; Wille McKay; Marion J. Eaddy; Randolph Hughes, Jr.; Arel Brownlee; William Bostic; Kenneth Howard; Alpha Christmas; Ronald Richardson; Clarence Winder; Ronald Crawford; Frank Gilchrist) on their own behalf and as representatives of a class of similarly situated individuals.

Named Defendant-Appellants:

(a) Local 542, International Union of Operating Engineers, AFL-CIO;

(b) the Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware;

(c) four contractor associations: The Contractors Association of Eastern Pennsylvania, the United Contractors Association, the General Building Contractors Association, Inc., and Pennsylvania Excavating Contractors Association on behalf of themselves and as representatives of a defendant class of employer associations (all but the Pennsylvania Excavating Contractors Association are petitioners in this Court); [1] and

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* All references to the Appendix to Petitions for Certiorari will be designated by "PA. —"; all references to the Joint Appendix on Writ of Certiorari will be designated by "JA. —".

1. The Pennsylvania Excavating Contractors Association dissolved in 1972 (PA. 29). In fashioning its injunctive decree, although the district court imposed a specific financial obligation of 10% on each of the other three named associations, it allocated no percentage of the total costs under the decree to the PECA.

(d) Glasgow, Inc. on behalf of itself and as the representative of a defendant class of employers.

Non-Party Members of Defendant Class-Appellants:

(a) Bechtel Power Corporation; and,

(b) United Engineers & Constructors, Inc.

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BRIEF ON BEHALF OF PETITIONERS CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA AND UNITED CONTRACTORS ASSOCIATION

OPINIONS BELOW

District Court

The opinion of the United States District Court for the Eastern District of Pennsylvania setting forth the findings of fact and conclusions of law respecting liability is officially reported at 469 F. Supp. 329 (PA. 9). The district court also issued a separate judgment and decree, which was accompanied by a supplemental opinion. The judgment and decree (PA. 228) is not officially reported. The supplemental opinion is officially reported at 488 F. Supp. 988 (PA. 213).

Court of Appeals

Argument on appeal was initially heard by a panel of three judges in the United States Court of Appeals for the Third Circuit. Before a decision was issued, the court ordered reargument *en banc*. Following reargument before six of the active judges, the judgment of the district court, because of an equally-divided vote, was affirmed. The one-sentence *per curiam* opinion of the court is officially reported at 648 F. 2d 923 (PA. 8).

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1981. A timely petition for a writ of certiorari was filed by Petitioners in No. 81-331 on August 17, 1981. On October 19, 1981, this Court granted the petition. This Court has jurisdiction by virtue of 28 U. S. C. § 1254(1).

THE STATUTE INVOLVED

The following statute, 42 U. S. C. § 1981, is involved in this case:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to the like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

This case involves an exclusive union hiring hall or referral system, which was conceived by Local 542, International Union of Operating Engineers, AFL-CIO ("Union") and imposed by it on construction contractors in collective bargaining. The jurisdiction of the Union is the eastern half of Pennsylvania and the State of Delaware. The specific provision relating to the referral system as it appears in the Union's collective bargaining agreement is racially neutral on its face and otherwise lawful (PA. 30).

This case was bifurcated for trial into liability and back-pay phases. The back-pay phase has not yet taken place. This case was tried as a class action both on the plaintiffs' side and on the defendants' side (PA. 17-18). The twelve individual black plaintiffs were certified as class representatives for persons similarly situated. Glasgow, Inc., the sole-named employer defendant, was ordered to act as class representative for all contractors (sometimes estimated at 1,400) who like Glasgow were required to use the Union's referral system. Likewise, the four named defendant contractor associations were ordered to act as class representatives for other associations who were involved in negotiations with the Union. These four associations are: the Contractors Association of Eastern Pennsylvania, which is a Pennsylvania non-profit corporation ("CAEP"); the United Contractors Association, a loosely-knit unincorporated contractor association ("UCA"); the General Building Contractors Association, Inc., which is a Pennsylvania non-profit corporation ("GBCA"); and the Pennsylvania Excavating Contractors Association ("PECA"), which dissolved in 1972 (PA. 14-15).

The district court, through the Honorable A. Leon Higginbotham, Jr., determined that defendant Union in-

tentionally operated its referral system in a racially-discriminatory fashion, in direct violation of its collective bargaining agreement and of 42 U. S. C. § 1981, as well as of Title VII of the Civil Rights Act of 1964 (PA. 120, 164-65).

The district court made no similar finding against any contractor who was legally bound to utilize the referral system or against any contractor association which had acted as a representative for employers in negotiations. In fact, the Court did not find that any contractor or association engaged in any conduct violative of 42 U. S. C. § 1981.[2] Rather, the district court held that the contractors who, because of their legal obligation to do so, used the Union's referral system and those contractor associations which engaged in negotiations with the Union were vicariously liable under 42 U. S. C. § 1981 for the Union's discriminatory conduct, notwithstanding its other findings that the contractors and the associations neither knew nor had reason to know of the Union's discriminatory conduct in breach of their agreement with it (PA. 168, 195-96, 198, 212).

The court of appeals, sitting *en banc*, affirmed unanimously the holding against the Union, but then divided equally on the issue of the liability of the contractors and associations, thereby affirming the district court. The *per curiam* opinion of the court of appeals announcing its equal division was one sentence in length (PA. 9).

Petitioners, CAEP and UCA, are two of the contractor trade associations which were found to be vicariously liable

2. The court below found that there was not before it any claim under Title VII against either the associations or Glasgow. This holding is implied in the opinion of the court below, and is fully supported by the uncontested fact that the associations and Glasgow were not parties to any charge before the Equal Employment Opportunity Commission, a prerequisite to an action in a federal court under Title VII (PA. 331).

under § 1981 for the discriminatory conduct of the Union. CAEP had a fluctuating membership during the period covered by this case which included approximately eighty to one hundred of the 1,400 employers encompassed within the defendant contractor class. One of the specific purposes of the CAEP is to negotiate collective bargaining agreements with various construction unions on behalf of its membership. UCA at all times pertinent hereto was a loosely-knit, unincorporated contractor association whose fluctuating membership included during the period in question approximately fourteen to twenty-eight of the above-described 1,400 employers.[3] The UCA never negotiated directly with the Union or any other union, but rather assigned the bargaining rights of its members to the CAEP[4] (PA. 29).

In 1961, the Union set out to impose on all contractors working within its geographic jurisdiction (eastern half of the Commonwealth of Pennsylvania and the entire State of Delaware) an exclusive hiring-hall referral system wherein all employer requests for job openings for operating engineers would have to be processed through one of the five Union hiring halls dispersed geographically within its work jurisdiction.[5]

Prior to 1961, any employer which had a collective bargaining agreement with the Union was free to obtain qualified operating engineers from any available source (PA. 23).

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3. A good portion of the members of the loosely-knit UCA were also members of the more formalized CAEP.

4. Unlike the CAEP, the UCA has never had any staff employee.

5. Because of its expansive size, the Union is divided into five districts, and there is a separate hiring hall for each district. One covers the five-county Philadelphia area. Another covers the State of Delaware. The remaining three cover the other twenty-nine counties in eastern Pennsylvania (PA. 28-29).

In 1961, contract negotiations with the Union were taking place on several fronts throughout the Union's work jurisdiction. Included among these fronts were Delaware, where a Delaware contractors association was negotiating with the Union on behalf of contractors represented by it, and Philadelphia, where the CAEP and others were negotiating on behalf of the contractors represented by them. Although there was severe opposition to the Union's demand for an exclusive referral system, the associations were informed by the National Labor Relations Board that they, as representatives of employers, were subject to a legal duty to bargain in good faith with the Union in respect of this demand because it is a mandatory subject of bargaining (JA. 306). Finally, prior to May 1, 1961, the Delaware employers capitulated to the Union's demand for an exclusive referral system and directed their negotiating representative to agree to the Union's demand (JA. 306).

The persistence of the Union for the exclusive hiring hall provision beyond Delaware and the severe opposition of the Pennsylvania contractors, through their bargaining representatives, eventually were transformed into a bargaining impasse over the referral system issue. An economically debilitating strike, which, the district court characterized as "destructive", ensued. This strike, which began on May 1, 1961, lasted for ten weeks. In the face of this strike, and, as the district court found, with the "prospect of serious adverse economic consequences" if the strike continued and faced with the reality that the "Union would not compromise for any other hiring alternative," the Pennsylvania employers, including those represented in bargaining by the CAEP, finally surrendered to the Union's demand for its exclusive hiring-hall system (PA. 21, 23).

Essentially, the same scenario unfolded as the agreement negotiated in 1961 approached its April 30, 1963, expiration date. In negotiations for their next collective

bargaining agreement in 1963, the CAEP acting again as the bargaining representative for some of the employers, unsuccessfully attempted to remove the referral system from their agreement with the Union. Once again, however, the Union struck over this issue and after another serious and lengthy strike, the contractor employers were forced to continue with the hiring-hall provisions (JA. 310).[6]

At this juncture, it is most important to understand the following: (1) that the district court correctly found that the agreement's provision dealing with the hiring-hall system is on its face racially neutral; and (2) that the district court found that the Union's intentional discriminatory conduct in the actual operation of the referral system was *in violation of*, and *not in compliance with*, the rules spelled out in the collective bargaining agreement for operation of that racially-neutral system[7] (PA. 30). In fact, the district court had this to say concerning the Union's actual operation of the referral system:

> The union procedures in general constituted a motley fabric of arbitrary departures from the rules. I do not find that union's intentional discrimination was practiced in such a way as to exclude absolutely all minorities from entry or to deny absolutely all minorities from the benefits of employment. The gross disparities and other evidence are nevertheless persuasive that the union practiced intentional discrimination (PA. 120).

6. The 1961 basic contractual language governing the exclusive referral system has remained, without any substantive modification, in the Union's collective bargaining agreements continuously to the present date.

7. Briefly summarized, except for certain specific limited situations, the referral system under the agreement is basically a "FIFO" (first in, first out) system, provided the individual seeking referral asserts that he is able to operate the piece of equipment for which the contractor was requesting an operator.

As stated, the major thrust of plaintiffs' argument in the district court was not that compliance with the hiring-hall provision caused discrimination since the provision was, in fact, racially neutral on its face, but rather that the Union *intentionally circumvented* the hiring-hall language and, in doing so, effected racially discriminatory job referrals (PA. 120). Moreover, although the district court found that the Union had violated § 1981 by its *failure to comply* with the racially-neutral hiring-hall referral provision, it found that the plaintiffs had *failed to prove* by a preponderance of the evidence that the CAEP and the UCA either engaged in the Union's intentional discrimination or even were aware or should have been aware of it (PA. 168). Notwithstanding these now unchallenged findings, the district court held the CAEP and UCA to be vicariously liable:

> Nevertheless, I find that the contractors and *associations* [including Petitioners] are injunctively liable to the Plaintiff class under § 1981 as a result of their contractual relationship to and *use* of a hiring hall system which in practice effectuated intentional discrimination, whether or not the . . . *associations* knew or should have known.[8]

(PA. 168) (emphasis added).

Moreover, in reaching said conclusion, the district court even conceded that ". . . no case has been found which imposes civil rights liability on the employer or *association* in these precise circumstances. . . ." (PA. 169) (emphasis added).

8. The district court's finding that the associations were vicariously liable because they used the hiring-hall evidences the district court's misperception of the role played by the associations. Since the CAEP and UCA never employed any operating engineers, *neither has ever used* the Union's hiring-hall system. In fact, the CAEP and UCA have had no contact whatsoever with the actual operation of the hiring hall.

Immediately following the issuance of the opinion by the district court on January 2, 1979, CAEP and UCA, among others, requested the Union immediately to remove the referral-system provision from its collective bargaining agreement. In view of the content of said opinion, the purpose for this request was to terminate any potential future liability to the contractors as a result of their use of the referral system. When the Union refused to comply with the request, the grievance machinery of the collective bargaining agreement was invoked on behalf of the contractors. A final and binding decision by labor arbitrator Jay Kramer ruled that in view of the district court's decision, the contractor employers did not have any further obligation under the collective bargaining agreement to use the Union's referral system. Upon a motion made by the Union immediately following this arbitration decision, the district court overrode this ruling and enjoined the contractors to continue the use of the referral system, while imposing a racial quota on the referrals made by the Union (JA. 380-384).

In addition, in its judgment and decree, the district court mandated extensive and far-reaching five-year injunctive relief against all fourteen-hundred employers who, at any time from 1965 forward, utilized the Union's hiring hall for referral of operating engineers. This mandatory injunction required, *inter alia*, that all employers meet minority hiring quotas, that skills training and upgrading programs be implemented for minorities, and that a vast network for monitoring and auditing employer reporting of minority utilization also be implemented (PA. 234-35, 241-44, 247-50). Since neither CAEP nor UCA is an employer or participant in the hiring-hall process, neither was ordered to hire anyone and neither was ordered to cease any present or past activity. However, under subsequent

implementing provisions of said decree, the district court ordered the CAEP and UCA to pay 20% of the total expenses incurred as a result of the ongoing injunctive program ordered against the Union and all contractors with whom it had a collective bargaining relationship. Although the first year of this five-year injunction has only just been completed, the district court has already ordered the expenditure of approximately $200,000 to implement the injunctive relief [9] (PA. 285).

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9. Moreover, in its judgment and decree, the district court also awarded reasonable attorneys' fees and costs to the named plaintiffs and Commonwealth (PA. 251). Counsel for the plaintiffs and Commonwealth have already requested the district court for an initial award of counsel fees for services through March, 1980, of over $1 million dollars and are seeking that said award be imposed jointly and severally among the six named defendants, including the CAEP and UCA.

SUMMARY OF ARGUMENT

The CAEP,[10] a non-profit corporation association, represented employers in collective bargaining negotiations with the Union, which represented operating engineers. After an economically disastrous strike, the employers were forced to accede to the union's lawful bargaining demand for an exclusive hiring-hall referral system, the terms of which are racially neutral and otherwise lawful. In the implementation thereof, and without the knowledge of the CAEP or UCA, the Union, in violation of the referral-system rules, effected racial discrimination in referring operating engineers for work.

The court of appeals, by an equally-divided vote, affirmed *per curiam* without opinion the holding of the district court that the CAEP and UCA are vicariously liable under 42 U. S. C. § 1981 for the discriminatory conduct of the Union, despite a finding that the plaintiffs had failed to prove that either the CAEP or UCA intended to discriminate.

1. None of the many cases cited by the district court supports the imposition of liability on the associations. That court used a line of cases under the National Labor Relations Act, especially *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961), but misread them (PA. 169-73). This line of cases, when interpreted accurately, holds that an employer may not be held liable for hiring-hall discrimination (union-related, not racial) by a union if that employer did not have knowledge of the discrimination. Although these cases are irrelevant when analyzing the question of

10. Petitioner UCA, who also did not employ operating engineers, did not bargain with the Union. On request of the UCA, the CAEP acted as bargaining agent not only for those employers who requested it to act as their bargaining representative but also for those employers who had designated the UCA as their bargaining representative (PA. 29).

the liability of an association which never used or had any contact whatever with the operation of a particular hiring hall, since they require knowledge of the union discrimination, liability never could be imposed upon the CAEP or UCA in this case because of their lack of knowledge of the Union's discrimination.

2. The district court also erroneously relied upon a series of Title VII cases which held a union and an employer jointly liable for the racially-disparate impact of a facially-neutral seniority provision in a collective bargaining agreement (PA. 181-86). These cases, too, are easily distinguished. First, they do not involve liability of an association bargaining representative. They do involve liability of employers. Second, in these Title VII cases, the actionable discriminatory impact resulted from the performance of the terms of the collective bargaining agreement in the manner *intended;* however, in the case at bar, the discriminatory conduct which forms the basis for the district court's decision was itself a *violation* by the Union of the terms of a collective bargaining agreement. And, in any event, the continued vitality of these cases was removed by this Court's decision in *International Brotherhood of Teamsters v. United States,* 431 U. S. 324 (1977).

3. The district court incorrectly applied the doctrine of *respondeat superior* to reach its vicarious liability [11]

11. This case raises the threshold question of whether there can be any vicarious liability at all under § 1981. This Court ruled in *Monell v. Department of Social Services of the City of New York,* 436 U. S. 658 (1978) that municipal authorities cannot be held vicariously liable under 42 U. S. C. § 1983. More specifically, in *Monell,* in the concurring opinion of Mr. Justice Powell, it is stated that § 1983 contains "a limitation of the statutory ambit to actual wrongdoers, i.e., a rejection of *respondeat superior* or any other principle of vicarious liability." *Monell, supra,* 436 U. S. at 707. It seemingly follows from *Monell's* limitation of liability under § 1983 to actual wrongdoers that

decision against the CAEP and UCA (PA. 186-96). *Respondeat superior* makes a master liable for the torts of his servant acting within the course of his employment. A servant performs services in the affairs of the master subject to at least the master's right of physical control. For the CAEP or UCA to be liable by virtue of *respondeat superior*, the Union must have been their servant in the operation of the referral system. The Union was not the servant of either the CAEP or UCA: (1) the Union did not perform any service for the CAEP or UCA since they never hired an operating engineer and never used the referral system; and (ii) the CAEP or UCA did not control the Union in its operation of its referral system and did not have the right to so control the Union.

4. The district court held that, by analogy to Restatement (2d) Agency, § 214, 42 U. S. C. § 1981 creates a "non-delegable" duty of a sort not precisely defined (PA. 192-194). Seemingly, that court perceived § 1981 as requiring the CAEP and UCA to insure that the Union not discriminate in the operation of the non-discriminatorily-constructed referral system earlier acceded to by the CAEP, even if they did not know the Union was dis-

11. (Cont'd.)

§ 1981 as well may not support vicarious liability. A reading of the two provisions *in pari materia* on the issue of vicarious liability is compelled both by this Court's opinion in *Monell* and by the basic purpose of § 1981, which is, as set forth herein, to prohibit only purposeful discrimination. In this regard, a major factor in the decision of *Monell* was Congress' rejection after heated debate of the proposed Sherman Amendment. That amendment would have made municipalities vicariously liable for the unlawful acts of its citizens. Obviously, the Reconstruction Congress was opposed in 1871 to vicarious liability in connection with § 1983. It is fair to infer that the Reconstruction Congress had no different view where, only a year before in 1870, it reenacted the related statute, § 1981.

criminating (PA. 414). Apart from the unsupportive language of § 1981, an examination of the so-called non-delegable duty principle, particularly as it is articulated in § 214, reveals that it is applicable where an independent contractor, as contra-distinguished from a servant, performs a service for a principal. As set forth in (3) above, the Union never performed any service for either the CAEP or UCA; therefore, the non-delegable duty principle has no application to the facts of this case.

5. The district court made the now unchallenged finding that there was a failure to prove that the CAEP or the UCA intended to discriminate. But, the courts below ruled that § 1981 does not require for its violation a finding of an intent to discriminate. Because of the nexus between the Fourteenth Amendment and § 1981, *inter alia*, this court should rule, especially in view of its decision in *Washington v. Davis*, 426 U. S. 229 (1976), that § 1981 does require for its violation a finding of an intent to discriminate. Because of the unchallenged finding of no intent to discriminate by the CAEP and UCA, they cannot be liable in this case under § 1981.

6. The courts below did not find that either the CAEP or the UCA engaged in any discriminatory conduct violative of § 1981. Instead, they concluded only that these associations, which are not even employers of operating engineers are vicariously liable for the discrimination committed by the Union. Nonetheless, under its injunction, the district court imposed substantial monetary obligations upon the CAEP and UCA. Since this Court has instructed that any federal-court injunction should not exceed in scope the wrong sought to be remedied, the CAEP and UCA should be relieved of any obligation under any decree in this case. *Dayton Board of Education v. Brinkman*, 433 U. S. 406, 420 (1977).

ARGUMENT

The decision by the district court, as affirmed by the equally-divided court of appeals, in respect of the CAEP and UCA is puzzling. They were *only* collective bargaining representatives *and not employers of operating engineers,* and, hence, could not have been found to have either used the hiring hall or contractually relied on the Union's referral system for employees. Notwithstanding, the district court stated that its theory of vicarious liability under *respondeat superior* applied to the defendant associations because they "participated in the creation or approval of an exclusive hiring hall provision" (PA. 128). However, as the district court readily recognized, the exclusive racially-neutral hiring-hall referral provision was on its face lawful (PA. 30). Moreover, although the district court made the now unchallenged findings that the associations, including CAEP and UCA, were not aware that the Union was operating the system in direct violation of the rules and in a discriminatory fashion, it nonetheless found that the associations could still be held vicariously liable under § 1981 (PA. 168-69).

In arriving at such a conclusion, the district court seemingly held that under § 1981 the associations not only have the duty not to engage in discriminatory conduct, but also a separate and additional duty to insure that the Union did not discriminate "outside" the agreement (PA. 186). In summary, what the district court did was to hold that under § 1981, a trade association which does not employ any person represented by the Union is to be viewed as a strictly-liable insurer for any and all discriminatory conduct perpetrated by Union hiring-hall personnel simply because that association "participated in the creation or approval of an exclusive hiring hall provision" which was neutral on its face (PA. 128). And, in arriving at its conclusion that the associations are vicariously liable

under § 1981 irrespective of whether the associations had any knowledge of said conduct, the district court did acknowledge that "no case has been found which imposes civil rights liability on the employer or *association* in these precise circumstances. . . ." (emphasis added) (PA. 169).

Upon examination of the lengthy liability opinion of the district court, very little of which is directed to any explanation for the liability found against the associations, it seems apparent that the court relied upon four separate bases for its at best dubious conclusion that vicarious liability could be imposed under § 1981 against the associations. They are as follows:

(1) that which the district court referred to as "analagous National Labor Relations Act cases";

(2) that which the district court referred to as "Title VII cases in which an employer's agreement to a facially neutral hiring hall system [sic] [12] had a discriminatory impact";

(3) that which the district court referred to as "cases and principles relating to the applicability of *respondeat superior* liability under § 1981 [13]; and

(4) perhaps what should be a subheading under (3), the presence in § 1981 of some undefined nondelegable duty which the district court perceived by "[a]nalogy to Section 214 of the Restatement (second) of Agency".[14]

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12. The cases cited by the district court involved facially-neutral *seniority* systems, not *hiring-hall* systems.

13. PA. 169.

14. PA. 192-93. In what purports to be a summary of the bases for the vicarious liability conclusion by the district court (PA. 169), there appears in (2) a reference to certain Title VII and § 1981 decisions. Although it may appear that these cases are used by the district court to ground liability, in fact that court, rather than relying on these cases, attempted to distinguish them.

However, when these bases are subjected to scrutiny, it quickly becomes obvious that, when taken individually or collectively, they do not lend any support whatever to the conclusion that collective bargaining representatives like the CAEP and UCA can be liable under the circumstances of this case for the discrimination committed by the Union.

I. The NLRA Cases Cited by the District Court Do Not Support the Imposition of Liability Upon the CAEP or UCA and Instead Require That They Be Held Not Liable.

The district court cited some cases decided under the National Labor Relations Act ("NLRA") as support for its conclusion that the associations are vicariously liable for the Union's discrimination (PA. 169-73). The NLRA cases were cited by the district court because of *its view* that they held an employer liable—none of the cases involved the liability of an association—for union-membership discrimination by a union in the operation of a referral system where the employer did not have knowledge or reason to know of the discrimination. A careful reading, however, of these cases reveals that the district court interpreted them incorrectly. Instead of the interpretation placed upon them by the district court, these cases hold that no liability can attach to an employer who neither knew nor had reason to know of discrimination being practiced by a union in its operation of a facially-neutral referral system. Thus, since the associations—who additionally never employed operating engineers—neither knew nor had reason to know of the Union's discrimination, this line of cases requires that they be *held not liable.*

In this context, the district court relied virtually entirely upon one decision: *Morrison-Knudsen Co., Inc. v.*

NLRB, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961).[15] In that case, a union which operated an exclusive hiring-hall discriminated against non-union individuals in referrals to an employer and forced non-union individuals to pay it a license fee known as "dobie". The court of appeals noted that the union acted as the employer's agent[16] in selecting the workers to be hired and that the union's discriminatory acts were properly chargeable to the employer as principal. The court stated, however, that it was clear that the employer knew of the illegal collection of the dobie and knew to some extent of the union's discriminatory referrals. 275 F. 2d at 917. The court of appeals therefore affirmed the findings of the NLRB that the employer had violated Section 8(a)(3) of the Act.

Despite these facts, the district court extrapolated from *Morrison-Knudsen* the sweeping proposition that under the NLRA, both the employer and its collective bargaining representative are legally responsible, on some type of absolute liability basis, for the discriminatory acts which a union, *in breach of a collective bargaining agreement*, commits in the operation of an exclusive hiring hall from which that employer obtains applicants for employment *without regard* as to whether the employer or

15. The district court also makes reference to the decision in *NLRB v. United States Steel Corp.*, 278 F. 2d 896 (3d Cir. 1960) in support of its notion that, under the NLRA, the action of a union agent may be chargeable to the employer principal on some type of vicarious liability theory. In *U. S. Steel*, however, the "union" agent, for whose discriminatory hiring decisions liability was imputed to the employer, was in fact a *supervisory employee* of the company and had been given the authority to act as a hiring agent.

16. Since the principal-agent relationship must be fiduciary in nature, as a matter of law a union never should be the agent of an employer. *See* Restatement (2d) of Agency, § 1; 29 U. S. C. §§ 158(a)(1) and (2).

its association representative knew or had reason to know of the discrimination. However, two other courts of appeals which have confronted the issue of the *Morrison-Knudsen* holding interpret that holding in a way diametrically opposed to the interpretation given by the district court here. These courts have noted that *Morrison-Knudsen* involved a situation in which it was clear that the employer had some knowledge of the union's discrimination. *See NLRB v. Master Stevedores Association of Texas,* 418 F. 2d 140 (5th Cir. 1969); *Lummus Co. v. NLRB,* 339 F. 2d 728 (D. C. Cir. 1964). Furthermore, these courts expressly require that in order for liability to attach to such an employer, the employer must know or have reason to know of the union's discrimination. *Master Stevedores, supra,* 418 F. 2d at 142; *Lummus, supra,* 339 F. 2d at 737. *See also NLRB v. Southern Stevedoring and Contracting Co.,* 332 F. 2d 1017 (5th Cir. 1964). In fact, the principles which these NLRA cases enunciate are, if anything, *stricter* than traditional common-law concepts in the cautionary approach which they take toward finding any liability relationship between an employer and the union which refers workers to it. *See Lummus, supra,* 339 F. 2d at 735-37. Also, as stated earlier, none of these cases involves an association.

Thus, despite the reliance of the district court upon *Morrison-Knudsen,* neither that decision nor other judicial authority under the NLRA supports the conclusion that a non-wrongdoing association may be held liable for the discriminatory acts of a union in the absence of knowledge or at least reason to know of the union's discrimination. Since the district court found that the associations neither knew nor had reason to know of the Union's discrimination, the NLRA authorities cited by the district court dictate that the CAEP and UCA are *not* liable (PA. 168).

II. The Title VII Seniority-System Cases Relied Upon by the District Court Are Inapposite.

The second of the bases used by the district court to impose vicarious liability on the associations, including the CAEP and UCA, involves facially-neutral seniority-system provisions in collective bargaining agreements, the application of which resulted in an actionable discriminatory impact upon minorities under Title VII of the Civil Rights Act of 1964.

In these cases, decided prior to the decision of this Court in *International Brotherhood of Teamsters v. U. S.*, 431 U. S. 324 (1977),[17] employer liability arose *directly from compliance* with the terms of a facially-neutral seniority provision, the performance of which resulted in a discriminatory impact upon minorities (PA. 181-86). These cases, too, do not involve association liability. And, in any event they have absolutely no legal relevance in the present context for in these Title VII seniority cases, as the district court recognized, the discriminatory impact resulted from performance of the collective bargaining agreement in the manner *intended* by the union and the employer. Liability in these Title VII cases, therefore, was assessed jointly against the employer and the union.

In the instant case, however, the district court found that the discrimination resulted not from the Union's com-

17. The cases referred to are: *Myers v. Gilman Paper Corp.*, 544 F. 2d 837 (5th Cir.), *cert. dismissed*, 434 U. S. 801 (1977); *Carey v. Greyhound Bus Co.*, 500 F. 2d 1372 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F. 2d 1364 (5th Cir. 1974); *Robinson v. Lorillard Corp.*, 444 F. 2d 791 (4th Cir.), *cert. dismissed*, 404 U. S. 1006 (1971). These decisions reflect the state of the law prior to *Teamsters*, in which case this Court ruled that a bona fide seniority system which has a discriminatory impact upon minorities is exempt from liability by virtue of Section 703(h) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(h).

pliance with the hiring-hall provision but because the Union acted *in violation* of the agreement (PA. 120). The district court recognized that if the Union had complied with the agreement, the hiring-hall provisions thereof would not have created any actionable discriminatory impact (PA. 30, 120). Despite this recognition, the district court nonetheless determined that only "a short conceptual step" is required to impose liability *vicariously* upon an association which had no reason to make use of the Union's referral system and had no knowledge or reason to know of the Union's acts of discrimination (PA. 186). In this regard, the district court's opinion is silent as to the length of the "step" necessary to impose liability upon the associations. Indeed, nothing in these Title VII cases supports the long conceptual leap which the district court strained to make in creating its theory of vicarious liability.

III. Under Settled Legal Principles of *Respondeat Superior*, the Relationship Between the Associations and the Union Is Insufficient to Support the Imposition of Vicarious Liability.

The third of the bases used by the district court to impose vicarious liability on the associations is the doctrine of *respondeat superior*. This doctrine makes a master liable for the torts of his servant acting within the course of his employment. Under well-settled master-servant principles, an association could only be liable to the plaintiffs in this action if it is determined that the Union was acting as the association's servant in carrying out the actual operation of the referral system and that it was acting within the course of its employment. If it is determined that the Union was not the servant of the associations, the associations cannot be held vicariously liable under the doctrine of *respondeat superior* for any torts of the Union. *See*, Restatement (2d) of Agency, § 219.

A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. *Id.* at § 2(1). Therefore, if the Union did not perform any services for the CAEP or UCA or if control of or the right to control the Union's hiring-hall personnel by these associations was absent, the Union was not the servant of the CAEP or UCA, but instead, at most was an independent contractor. If the Union is an independent contractor, the general rule of *respondeat superior* is that the associations could not be liable for any tortious conduct, including violations of § 1981, committed by the Union.

It is clear in this case that the Union did not perform any services for either the CAEP or UCA. Those associations, which did not ever employ an operating engineer, had no reason to and did not use the Union's referral system. As stated previously, the CAEP and UCA were simply bargaining representatives for contractors who employed, among others, operating engineers. For this reason alone, the Union could not have been a servant of the associations, and therefore they could not have been liable for any tort of the Union.

Moreover, the district court accepted, by implication, that the associations—and for that matter any contractor—did not physically control the operation of the Union's referral system. However, that court must have concluded that the associations did have some *right to control* the physical operation of the Union's referral system, although it never defined what gave rise to that asserted right to control. And, if that court did not so conclude, then its reliance upon *respondeat superior* was for that reason wholly misplaced.

Notwithstanding the district court's assertions, plainly the associations did not have any right to control the opera-

tion of the Union's referral system. At no place in the Union's collective bargaining agreement or elsewhere is there any expression or implication that either the CAEP or UCA had any right to control the operation of that system. The district court referred in this context to the non-discrimination clause in that agreement. That provision, however, defines only the *result* to be produced, not the *means* therefor. Also, there is a reference in the opinion of the district court to a grievance procedure to adjudicate complaints of individual operating engineers respecting the operation of the referral system. Clearly, this does not impart to either the CAEP or the UCA a right to control the operation of the Union's referral system, simply because this procedure may be triggered only by the complaint of an individual represented by the Union.

Therefore, since neither the CAEP nor the UCA had either control of or the right to control the physical operation of the Union's referral system, for that reason also the Union could never be a servant of those associations.

Quite apart from a detailed analysis against the backdrop of *respondeat superior* principles, the nature of the relationship between a union on the one hand and an employer and its bargaining representative on the other clearly reveals that the union never could be the servant of the representative or the employer. As a matter of law, a union must be free from domination or control by any employer or his representative in carrying out the union's function as a representative for employees. 29 U. S. C. §§ 158(a)(1) and (2). But, the essence of the legal relationship of master and servant is the actual or right to dominate or control the physical conduct of the servant. By a simple comparison of the nature of the union-employer relationship and that of master-servant, it becomes apparent that they are intrinsically incompatible and cannot co-exist.

IV. The Concept of a Non-Delegable Duty Under § 1981 Is Not Applicable to the Associations.

The final of the four bases used by the district court in its attempt to support its liability theory against the associations is that by analogy to Restatement (2d) Agency § 214, § 1981 should be interpreted as creating a so-called non-delegable duty which, in turn, makes the associations liable under the facts of this case. Although it refers to such a duty, the district court does not give any hint as to the precise nature of that duty.

To gain some understanding of the district court's ruling in this regard, it is helpful to focus on why it took this novel position. As previously set forth, there simply is no basis in the record of this case for a determination that the Union was the servant of any association, thereby justifying the conclusion that such association, as master, is vicariously liable for the torts of the Union.

The general rule is that a principal is not liable for the torts of an independent contractor. However, as recognized in § 214, as to a few somewhat unique fact patterns, a principal may be held liable for a failure by an independent contractor to discharge a duty owed by the principal to a third party. The duty found in these fact patterns is referred to as a non-delegable duty on the part of the principal.

Lacking any basis whatever to impose vicarious liability under the general rule, the district court reached out for the non-delegable duty exception, and then without precedent, analysis, or hesitation it read a non-delegable duty into § 1981.

As reflected in the district court's opinion (PA. 194-95), the factual underpinning for that court's holding that the employers and associations are liable for the Union's

discriminatory conduct in operating the hiring hall was the finding that the *employers* delegated a function of their hiring process to the Union. However, this finding is totally immaterial to and unsupportive of a conclusion of liability as against the associations. Clearly, as non-employers of operating engineers, the associations *never delegated* any part of their hiring process to the Union. Therefore, in the actual operation of the referral system, the Union personnel never performed any functions that the associations themselves would have had to perform irrespective of whether the collective bargaining agreement contained a hiring-hall provision.

In light of the foregoing, there can be no basis for the conclusion that there exists as between the *associations* and the *Union* even a principal-independent contractor relationship. Moreover, since it is clear that no principal-independent contractor relationship exists between the associations and the Union, it is equally clear that the concept of non-delegable duty cannot be utilized as a basis for imposing liability against the CAEP and UCA.

V. Since the Associations Did Not Engage in Any Intentional Racially-Discriminatory Conduct, They Cannot Be Held Liable Under § 1981.

The district court held that CAEP and UCA did not themselves engage in any racially-discriminatory conduct. In point of fact, in their role as representatives for some of the 1400 employers in the defendant class, their only operative conduct that was relied upon by the district court was to accede to a lawful exclusive hiring-hall provision which is racially-neutral on its face. Moreover, the district court concluded that there was no showing that the associations either knew or had reason to know that the Union had engaged in discriminatory conduct, and found an absence

of proof of an intent to discriminate. Nonetheless, the district court still found that the associations were liable under § 1981. By so holding, the courts below have made the associations absolutely liable for any and all discriminatory acts against minority operating engineers, which constituted the Union's breach of the hiring-hall provisions, and did so in the absence of a finding of an intent to discriminate.

This Court should not permit such a ruling to stand for it is totally contrary to the overwhelming weight and better-reasoned authority which holds that, before a party can be held liable under § 1981, the plaintiff must prove an intent to discriminate. In accord with this Court in *Washington v. Davis*, 426 U. S. 229 (1976), nine of the courts of appeals have now either held or implied that proof of intentional discrimination is necessary under § 1981.[18] Therefore, in the absence of any finding that the CAEP or

18. *Croker v. Boeing Co.*, — F. 2d —, 26 FEP Cases 1569 (3d Cir. 1981); *Des Vernes v. Seekonk Water Dist.*, 601 F. 2d 9 (1st Cir. 1979); *Guardians Ass'n v. Civil Service Comm'n*, 633 F. 2d 232 (2d Cir. 1980), *petition for cert. filed*, 50 U. S. L. W. 3157 (U. S. Aug. 31, 1981) (Nos. 81-431, 432); *Williams v. DeKalb County*, 582 F 2d 2 (5th Cir. 1978); *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F. 2d 457 (5th Cir. 1978); *Detroit Police Officers' Ass'n v. Young*, 608 F. 2d 671 (6th Cir. 1979), *cert. denied*, 101 S. Ct. 3079 (1981); *City of Milwaukee v. Saxbe*, 546 F. 2d 693 (7th Cir. 1976); *Mescall v. Burrus*, 603 F. 2d 1266 (7th Cir. 1979); *Johnson v. Alexander*, 572 F. 2d 1219 (8th Cir.), *cert. denied*, 439 U. S. 986 (1978); *Donnell v. General Motors Corp.*, 576 F. 2d 1292 (8th Cir. 1978); *Craig v. County of Los Angeles*, 626 F. 2d 659 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 1364 (1981); and *Chicano Police Officer's Ass'n v. Stover*, 552 F. 2d 918 (10th Cir. 1977). *But see Kinsey v. First Regional Securities, Inc.*, 557 F. 2d 830, n. 22 (D. C. Cir. 1977).

Obviously, the ruling of the Third Circuit in *Croker, supra*, is contradictory to the earlier ruling in the instant case by that same court.

UCA had an intent to discriminate, they cannot be liable under § 1981 [19] (PA. 195).

A. The Relationship Between § 1981 and the Equal Protection Clause of the Fourteenth Amendment Requires the Conclusion That for § 1981 to Be Violated There Must Be a Finding of Discriminatory Intent.

§ 1981 was derived from both § 1 of the Civil Rights Act of 1866 and § 16 of the Voting Rights Act of 1870. *Runyon v. McCrary*, 427 U. S. 160, 169 n. 8 (1976). Indeed, this Court has stated that "the operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866." *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U. S. 431, 439 (1973); *Runyon v. McCrary*, 427 U. S. at 171.

Following the enactment of the Civil Rights Act of 1866, some members of the Congress became concerned that the Act's application to the states may have been violative of the Constitution and that a subsequent Congress might repeal the Act. A joint resolution which addressed these concerns later became the Fourtenth Amendment. *United States v. Wong Kim Ark*, 169 U. S. 649, 675 (1898). This Court has recognized that a major impetus behind enactment of the Fourteenth Amendment was the Congressional goal of treating these issues by incorporating the provisions of the 1866 Act into the Constitution. *Hurd v. Hodge*, 334 U. S. 24, 32-33 (1948). This Court has also recognized the close relationship between the 1866 Act and the Fourteenth Amendment in stating that the two enactments were "expressions of the same general congressional policy." *Id.* at 32.

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19. Even if this Court were to engraph the Title VII "impact only" standard under § 1981, reversal is still required because plaintiffs failed to prove that the petitioner associations engaged in any conduct whatever which caused a racially disparate impact.

Subsequent to the passage of the Fourteenth Amendment, the Civil Rights Act of 1866 was retained in its entirety as a part of the Voting Rights Act of 1870.[20] *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U. S. at 439 n. 11. Section 1 of the 1866 Act was reenacted, with minor revisions which did not alter its scope,[21] in § 16 of the 1870 Act. In 1874, § 16 of the 1870 Act was codified as § 1977 of the Revised Statutes, which today is codified as 42 U. S. C. § 1981. The language of Revised Statutes § 1977 was identical to that which constitutes § 1981, and this Court has stated that § 1977 put "in the form of a statute what had ben substantially ordained by the [Fourteenth] amendment. It was a step toward enforcing the constitutional provisions." *Strauder v. West Virginia*, 100 U. S. 303, 312 (1879); *see Buchanan v. Warley*, 245 U. S. 60, 79 (1917) (§ 1977 a statute "enacted in furtherance of the [Fourteenth Amendment's] purpose.").

In addition to the common historical background and the congressional policy underlying the two provisions, a reading of the provisions *in pari materia* indicates that both are fundamentally *equal protection enactments*. Senator Trumbull, the author of the bill which was to become Section 1 of the Civil Rights Act of 1866 and eventually § 1981, in explaining its purpose stated that "any statute which is not *equal to all*, and which deprives any citizen of civil rights, which are secured to other citizens is an unjust encroachment upon his liberty . . ." Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (emphasis added).

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20. Section 18 of the Voting Rights Act of 1870 provided in pertinent part: "That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted. . . ."

21. *See, Jones v. Alfred H. Mayer Co.*, 392 U. S. 409, 436 (1968).

In view of the above, it is apparent that the relationship of § 1981 and the Fourteenth Amendment is one which, for practical purposes, is so close that the two enactments are difficult if not impossible to separate on any basis. The two provisions have a common origin and directly relate to identical congressional goals.

In *Washington v. Davis*, 426 U. S. 229 (1976), this Court held that proof of a racially discriminatory intent or purpose is required in order to establish a Fourteenth Amendment equal protection violation. As a direct result of the demonstrated inseparable relationship between § 1981 and the Fourteenth Amendment, the intent standard which this Court required in *Washington v. Davis* must be applied to alleged violations of § 1981. Such a determination would be consistent with sound rules of statutory construction, which require statutes involving constitutional rights to be read in light of the Constitution, and indeed that "[t]he Constitution and the statute will be construed together as one law." *Cincinnati, No. 2 T. P. R. Co. v. Kentucky*, 115 U. S. 321, 334 (1885).

B. The Language and Legislative History of § 1981, as Well as Prior Decisions of This Court, Require a Determination That § 1981 Is Directed Only Toward Acts of Purposeful Discrimination.

There exists absolutely no indication in the language or legislative history of § 1981 which would support the extension of liability for violations thereof to other than acts of intentional or purposeful discrimination. On the contrary, in *Croker v. Boeing Co.*, — F.2d — , 26 FEP Cases 1569 (3d Cir. 1981), the court stated "if [the language] points in any direction, it suggests a requirement for proof of purposeful discrimination." *Id.* at 1575, *citing City of Memphis v. Greene*, — U. S. —, 101 S. Ct. 1584, 1602 (1981) (White, J., concurring); *Guardians*

Ass'n v. Civil Service Comm'n, 633 F. 2d 232, 267 (2d Cir. 1980). Similarly, the legislative history unequivocally demonstrates that the 39th Congress was concerned with acts of purposeful racial discrimination which would deny black citizens their basic civil rights under the laws of the land.

Justice White, concurring in the decision of the Court in *City of Memphis v. Greene, supra*, a 42 U. S. C. § 1982 case, has stated that "nothing in the legislative history of [the 1866] Act suggests that Congress was concerned with facially neutral measures which happened to have an incidental impact on former slaves." [22] Since this Court has clearly held that Sections 1981 and 1982 are so interrelated that they should be construed similarly when applied to private forms of discrimination, *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U. S. at 440, the rationale of Justice White's opinion is fully applicable to the instant § 1981 action. The legislative history of Title VII stands in stark contrast to that of § 1981 in that the

22. 101 S. Ct. at 1603. Justice White also stated that "[t]he supporters of the bill emphasized time and again that the measure was designed to eradicate *blatant deprivations* of civil rights. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 322, 339-40, 474-75, 516-17, 1123, 1151-52, 1159-60, 1833-35 (1866)." *City of Memphis v. Greene*, 101 S. Ct. at 1603 (emphasis added). *See, Croker v. Boeing Co.*, — F. 2d —, 26 FEP Cases at 1577 ("We think that it is more likely than not that the statute was addressed to such intentional conduct . . . The employees have not directed our attention to any legislative history that reveals a contrary intent. We doubt that they could"); *Guardians Ass'n v. Civil Service Com'n.*, 633 F. 2d at 267 ("It is sufficient to say that plaintiffs have been unable to cite and we have been unable to find *anything* in the legislative history to indicate that either the Thirty-Ninth Congress, which enacted the 1866 Act over a presidential veto, or the later congresses that subsequently re-enacted the provisions understood the law to prohibit anything other than the racially motivated refusal to treat whites and non-whites in the same, neutral manner").

former indicates congressional concern over the impact of neutral employment practices on employment opportunities. *See Griggs v. Duke Power Co.*, 401 U. S. 424, 434-36 (1971).

Likewise, prior decisions of this Court suggest a similar result. In *Jones v. Alfred H. Mayer Co.*, 392 U. S. at 426, which involved Section 1 of the Civil Rights Act of 1866, and specifically 42 U. S. C. § 1982, this Court held that § 1 of the 1866 Act, which was a source for § 1981, was intended to prohibit all "racially motivated" deprivations enumerated in the statute. *Id.* And, in *Runyon v. McCrary*, 427 U. S. at 170-71, this Court held that § 1981 would be violated if a Negro offeree is not extended the same opportunity to enter into contracts as is extended to white offerees, *solely because he was a Negro. Id.* Thus, the holdings of this Court also support the view that § 1981 requires proof of purposeful or intentional discrimination.

C. Application of Other Than the Intentional Discrimination Standard to § 1981 Would Substantially Undermine Both *Washington v. Davis* and the Title VII Enforcement Scheme.

In *Washington v. Davis*, this Court indicated that the application of other than an intentional discrimination standard to the Fourteenth Amendment would raise serious questions about many existing statutes. 426 U. S. at 248. As demonstrated above, the scope of § 1981's prohibitions is virtually coextensive with that of the Fourteenth Amendment's equal protection clause. Both enactments extend well beyond the area of employment discrimination, and thus if § 1981's standard of liability is held to be less than that of the Fourteenth Amendment, the holding of *Washington v. Davis* may easily be circumvented by plaintiffs alleging a § 1981 cause of action in lieu of a Fourteenth Amendment based claim. "In fact, because

§ 1981, unlike the fourteenth amendment, covers not only governmental but also private conduct, an impact standard applied to § 1981 could be more intrusive than would one applied to the fourteenth amendment." *Croker v. Boeing Co.*, 26 FEP Cases at 1577 (citations omitted).

Moreover, Title VII is the regulatory scheme chosen by Congress in the employment discrimination area. Section 1981's application to this area is dissimilar to that of Title VII in several important respects: 1) Title VII requires administrative prerequisites to suit while § 1981 has none;[23] 2) Title VII requires that attempts at conciliation be exhausted prior to initiation of suit while § 1981 does not;[24] 3) Title VII contains a two-year statute of limitations on back pay while § 1981 has no such limitation;[25] 4) § 1981 provides remedies which are distinct from those provided by Title VII.[26] All of the above-referenced differences between Title VII and § 1981 would tend to encourage plaintiffs to bypass and/or circumvent Title VII, the congressionally-chosen scheme, should this Court determine that a § 1981 violation can be sustained without proof of intent to discriminate. The number of employment discrimination cases reaching the federal court system would certainly increase, contrary to the intent of Congress in enacting Title VII.

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23. *Compare*, 42 U. S. C. § 2000e-5(e) and (f)(1) *with Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454, 460-62 (1975).

24. *Compare, e.g., Occidental Life Insurance Co. v. EEOC*, 432 U. S. 355, 359-60 (1977), and *Alexander v. Gardner-Denver*, 425 U. S. 36, 44 (1974), *with Johnson v. Railway Express Agency, Inc.*, 421 U. S. at 460-62.

25. *Compare*, 42 U. S. C. § 2000e-5(g) *with Johnson v. Railway Express Agency, Inc.*, 421 U. S. at 460.

26. *See, Johnson v. Railway Express Agency, Inc.*, 421 U. S. at 461.

VI. In Ordering a Sweeping Remedy Imposing Obligations Far Beyond Those Necessary to Correct the Precise Violation Found, the Courts Below Exceeded the Scope of Remedial Authority.

The violations of law found by the district court were the *Union's* discriminatory entry practices and its discriminatory implementation of a referral system which on its face was neutral and which, if operated properly, would not have resulted in discrimination. The district court did not find that any associations, including the CAEP and UCA, were liable because their own employment practices in any way violated § 1981. Rather, the district court found that they were vicariously liable notwithstanding the unchallenged findings (i) that they negotiated a lawful and racially neutral hiring-hall referral system, (ii) that they, as non-employers of operating engineers, had no subsequent contact with the actual operation of the Union's hiring hall, and (iii) that they had no knowledge that the Union was violating the hiring-hall's referral rules and in so doing was engaging in racially-discriminatory conduct (PA. 30, 168).

In view of its findings that the Union discriminated in entry and in its referrals, the district court quite properly imposed various affirmative obligations upon the *Union* designed to ensure, *inter alia*, that the referral system would work properly. But the district court also mandated an extensive remedial scheme directed to the defendant class of employers—a financially expensive scheme which includes *inter alia*: (1) mandatory manpower utilization quotas and monthly and quarterly reports of compliance therewith; (2) participation in a mandatory skill upgrading program; and (3) the creation of a master's position, reporting and advisory committee, and the financing thereof.[27] Such sweeping injunctive relief against

27. In paragraph 27 through 30 of its decree, as modified by its various post-decree orders, the district court has imposed upon

all fourteen-hundred contractors in the defendant contractor class itself is inconsistent with the decisions of this Court. Moreover, although finding no wrongdoing by the CAEP or UCA, the district court nevertheless ordered that each of these associations pay ten percent (10%) of the total expenses of the court's mandated remedial training and hiring program (PA. 285). So far, the expenses incurred in the first year under the five-year decree

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27. (Cont'd.)

each of the more than fourteen-hundred "defendant" employers specific minority manpower utilization quotas that each must meet or risk further court-imposed sanctions. In this regard, at paragraph 29, the court not only ordered that a court-appointed master, to whom broad authority was delegated under paragraphs 9 to 11, would *audit* each of the more than fourteen-hundred employers' performance on a quarterly basis, but also placed the burden of proving a valid reason for not reaching the court-imposed minority employment quotas on the individual employer (PA. 243).

In conjunction with its imposition of these minority employment quotas, the district court at paragraph 43 as amended mandated the structuring of an elaborate record-keeping and reporting system wherein each of the fourteen-hundred employer members of the defendant class is required to file with the master, a reporting committee, and the plaintiffs both monthly and quarterly reports regarding the racial breakdown of hours worked and wages earned by operating engineers. So, too, in paragraph 44 as amended, the district court set up a detailed enforcement system based upon these reports wherein on both a quarterly and annual basis the court-appointed master is permitted to hold compliance hearings and take corrective action on allegations of non-compliance against any one or all of the fourteen-hundred employers required to make said reports (PA. 248-49).

In addition, the court in paragraphs 24, 41, and 42 imposed upon the defendant employers the responsibility for retraining and upgrading programs to be developed under the auspices of a master and advisory committee (PA. 240, 247).

have totalled approximately $200,000. Already the CAEP and UCA have been ordered to pay approximately $40,000 under the decree. The end result of such an order is that the district court is requiring the CAEP and UCA to pay money damages for the wrongs actually committed by the Union.

Clearly, there is no basis under the well-established principles of equity law for the imposition of such monetary remedy against the CAEP and UCA. This Court has admonished on numerous occasions that in fashioning an equitable remedy for a violation of law, a federal court is required to tailor the scope of the remedy to fit the precise nature of the violation. *See Dayton Board of Education v. Brinkman*, 433 U. S. 406, 420 (1977); *Milliken v. Bradley*, 418 U. S. 717, 744 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971); *see also Rizzo v. Goode*, 423 U. S. 362 (1976).[28] The principles articulated in the foregoing cases brought under § 1983 apply with equal force in the area of employment discrimination. *See EEOC v. International Union of Operating Engineers, Local 14*, 553 F. 2d 251, 256 (2d Cir. 1977) (district court "should interfere with the defendant's operations no more than is necessary to [remedy the wrong]."); *Sledge v. J. P. Stevens & Co.*, 585 F. 2d 625, 650 (4th Cir. 1978) (vacating district court's imposition of quotas on the ground that the violations "are rectified by other of the injunctive provisions").

28. Seemingly, the logical extension of this principle is that, since a person held vicariously liable is not a tortfeasor, as a matter of law that person cannot be subject to an injunction relating to the tort for which he is held vicariously liable. *See, EEOC v. Enterprise Association Steamfitters*, 542 F. 2d 579, 589 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977); J. Pomeroy, *Equity Jurisprudence* § 1338 (5th ed. 1941).

Quite specifically, the district court, in accord with the plaintiffs' allegations,[29] found that the Union discriminated against minorities: (1) in entry into the Union; (2) in entry into the hiring-hall system; and (3) in actual selection for referral to work from the hiring-hall lists (PA. 30, 162). Accordingly, if these three discriminatory practices did not exist, there would have been no basis upon which the district court could have relied to find that the Union denied minorities the opportunity to gain work as operating engineers. Therefore, for purposes of injunctive relief, if these three discriminatory practices are remedied by the court's injunction, the underlying basis of the Union's discrimination will have been cured. Clearly, this goal has been reached through the court's specific imposition of affirmative entry and referral quotas upon the Union in its decree.

In light of these controlling principles, the district court, in fashioning its remedy, went far beyond the nature and extent of the violation proved. Surely, the findings of the district court did not justify any imposition of any financial burden even upon any employer. In view of the findings and the content of the district court's decree, it was even more outrageous for that court to impose a financial burden under its decree on non-wrongdoing entities who, as non-employers of operating engineers, have no employment nexus whatsoever with the plaintiffs. Therefore, this Court should direct the removal from the decree of all parts thereof which pertain to the CAEP and UCA,

29. As the district court stated: plaintiffs' allegations of discrimination are not directed against the hiring hall system per se but against the *Union's alleged intentional refusal to follow their own hiring hall rules,* thus causing intentional discrimination against and a discriminatory adverse impact on minorities. Plaintiffs *also allege* discrimination particularly in *admission into the Union* and *admission into the job referral process* (emphasis added) (PA. 30).

including that portion which specifically imposes the twenty percent (20%) financial obligation upon them.

As stated earlier, as *non-wrongdoing*, non-employers of operating engineers, there are absolutely no grounds under equity law to impose upon these associations the payment of twenty percent (20%) of the total expenses imposed by the district court under its decree. As reflected in the district court's finding, the Union was the active wrongdoer herein and hence it, and not the CAEP or UCA, should bear the financial burden of the relief decreed as a result of its discriminatory racial conduct in its referral system. To shift part of this financial burden to the CAEP and UCA is totally inequitable.

In fact, it is recognized that even between parties who have been held liable, costs and expenses are properly imposed only on the party found to have been the active wrongdoer. *City Bank v. Rivera Davila*, 438 F. 2d 1367, 1371 (1st Cir. 1971); *Thomas v. Duralite Co.*, 386 F. Supp. 698, 730 n. 14 (D. N. J. 1974), *aff'd in part and reversed in part on other grounds*, 524 F. 2d 577 (3d Cir. 1975). Additionally, in this regard, it is noted that the district court's imposition of financial burden upon the CAEP and UCA is diametrically opposed to the ruling of at least one other court faced with a strikingly similar fact pattern, but which, unlike the district court, followed the well-established principle of tailoring a remedy to cure only the defect found. From the associations' perspective, this strikingly similar fact pattern exists in *Rios v. Enterprise Ass'n Steamfitters Local 638*, 400 F. Supp. 993 (S. D. N. Y. 1975), *aff'd sub nom., EEOC v. Enterprise Ass'n Steamfitters*, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977) (union only defendant chargeable with attorneys' fees).

CONCLUSION

In view of the foregoing, the judgment of the court of appeals as to the CAEP and UCA should be reversed and this Court should remand for entry of judgment in favor of the CAEP and UCA and for modification of the injunction so as to exclude them from its terms.

Respectfully submitted,

JOHN J. MCALEESE, JR.
THOMAS J. MCGOLDRICK
LOUIS A. MINELLA
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004
Attorneys for Petitioner

CUNNIFF, BRAY & MCALEESE
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004
Of Counsel: